Office Supreme Court, U. S.
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No. [redacted]78

OCTOBER TERM, 1920.

IN THE

Supreme Court of the United States

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

DIRECTOR GENERAL OF RAILROADS, Respondent.

PETITION FOR WRIT OF CERTIORARI, NOTICE OF PRESENTATION AND BRIEF IN SUPPORT OF PETITION.

JOHN J. McDEVITT, JR.,
FREDERICK S. TYLER,
Counsel for Petitioner.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 387.

Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

Director General of Railroads, Respondent.

SIR:—Please take notice that upon the annexed petition of Gertrude M. Reed, administratrix of the estate of Leo C. Reed, deceased, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the fourth day of October, 1920, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of the said Court granted (entered) in the above cause on the twelfth day of April, 1920, which reversed the decree or judgment of the Court

of Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered in the said Court on the second day of December, 1919, in favor of the plaintiff for the sum of $15,000.

Dated at Philadelphia, this fourteenth day of September A. D., 1920.

JOHN J. McDEVITT, JR.,
811 Pennsylvania Building, Philadelphia, Pa.
FREDERICK S. TYLER,
National Metropolitan Bank Building, Washington, D. C.
Counsel for Petitioner

To William Clarke Mason, Esq., Philadelphia, Pa., attorney for Director General of Railroads, United States Railroad Administration, operating Philadelphia and Reading Railway Company.

No. 387. OCTOBER TERM, 1920.

IN THE

Supreme Court of the United States

GERTRUDE M. REED, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

DIRECTOR GENERAL OF RAILROADS, Respondent.

PETITION FOR A WRIT OF CERTIORARI.

JOHN J. McDEVITT, JR.,
FREDERICK S. TYLER,
Counsel for Petitioner.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 387.

Gertrude M. Reed, Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner,

vs.

Director General of Railroads, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Gertrude M. Reed, administratrix of the estate of Leo C. Reed, deceased, in support of this, her petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania to review a decree or judgment on the twelfth day of April, A. D. 1920, which reversed a judgment of the Court of Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered on the second day of December, A. D. 1919, in favor of the plaintiff below, the petitioner here, against the respondent, for $15,000, respectfully shows:—

1. That this was an action instituted at common law by the petitioner as administratrix of the estate of her deceased husband claiming damages, under the Federal Employers' Liability Act and its supplements for his death.

2. That the respondent filed an affidavit of defense alleging Government control and a general denial of negligence, upon which pleadings issue was joined, the case tried by jury and a verdict rendered in favor of your petitioner in the sum of $19,000 and by the direction of the Court a remittitur filed of all sums in excess of $15,000, whereupon judgment was entered.

3. That the record, a certified copy of which is attached hereto shows that the decedent was employed as a flagman on a regular train of the defendant, being operated between Philadelphia and South Bethlehem, Pennsylvania, which it was admitted at trial, carried interstate commerce. Upon arriving at South Bethlehem, but before the trip was finished, and the decedent's day's work (the trip) was completed, he sustained fatal injuries, while acting within the course of his employment, through the negligence of the engineer, pushing the caboose over a derail.

4 The opinion of the Supreme Court of the State of Pennsylvania held that the accident was the result of the negligence of the engineer and that the case is controlled by the Federal Employers' Liability Act, to wit: That the decedent was killed while engaged in interstate commerce, and that his death resulted from the negligence of the engineer, but concluded in effect that the decedent among the assumed risks of his employment had assumed the possibility of negligence of a fellow servant, without there having been any reason for anticipating the same.

5. The Supreme Court of the State of Pennsylvania reached this conclusion as a question of law and not of fact and without evidence to justify such conclusion under the authorities of your Honorable Court.

6. Hearing upon the said appeal was before but five of the Justices of the Supreme Court of the State of Pennsylvania, one of whom dissented.

7. That the question at law involved in this case is:—

> "Can decedent while engaged in intertate commerce be held *per se* to have assumed the risks incident to negligence of a fellow servant where the latter's negligence is admitted (in opinion) and there was no reason for decedent to have anticipated such negligence?"

8. The Supreme Court of the State of Pennsylvania held there was an assumption of risk *per se*. .To sustain this opinion would nullify fully and completely the effect of the Federal Employers' Liability Act.

9. It was the very purpose and intention of the Federal Employers' Liability Act to permit a right of action in such cases, and to do away with the fellow servant doctrine as a defense.

10. That the decision of the Supreme Court of Pennsylvania is not in accord with the decisions of your Honorable Court, but on the contrary is in direct conflict with the opinions of your Honorable Court in so holding that the decedent assumed the possibility of negligence on the part of a fellow servant.

11. The said opinion of the Supreme Court of the State of Pennsylvania is in conflict with and particularly ignores the decision of your Honorable Court in Chicago R. I. & P. Rwy. Co. *vs.* Ward, 40 Supreme Court Reporter, 276.

12. That unless your Honorable Court shall correct the errors of the Court below, your petitioner by the entr of judgment notwithstanding the verdict herein, will be deprived of property without due process of law and will be deprived of rights, privileges and immunities under the Federal Employers' Liability Act and its supplements.

Wherefore, your petitioner prays that a writ of *certiorari* may issue out of and under the seal of your Honorable Court, directed to the Supreme Court of the State of Pennsylvania commanding that Court to certify the case to this Court for review and determination, as provided in the Act of Congress, known as the "Judicial Code" or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, &c.

GERTRUDE M. REED,
Administratrix of the Estate of Leo C. Reed, Deceased, Petitioner.

JOHN J. McDEVITT, JR.,
FREDERICK S. TYLER,
Counsel for Petitioner.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

GERTRUDE M. REED, being duly sworn, says that she is the Administratrix of the Estate of Leo. C. Reed, deceased, the Petitioner named in the foregoing petition, that she has read the same and knows the contents thereof, and that the facts therein are true to the best of her knowledge, information and belief.

GERTRUDE M. REED.

Sworn to and subscribed before me this 8th day of June, A. D. 1920.

ROYAL W. URIE,
Notary Public.

[SEAL]

Commission Expires March 20, 1921.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The plaintiff's deceased husband, while employed as a brakeman by the defendant and acting in the course of his employment in interstate commerce, was killed as a result of the negligence of his engineer.

This suit was instituted for the benefit of the widow and child under the Federal Employers' Liability Act and its supplements, at trial there was no defense and a jury in the Common Pleas Court rendered a verdict in favor of the plaintiff for $19,000, which amount was reduced under order of the Court, by the filing of a remittitur of all sums over $15,000, and judgment entered thereon. Thereupon, the defendant appealed to the Supreme Court of the State of Pennsylvania, which Court reversed the judgment of the Court below entering judgment for the defendant *non obstante veredicto*, on the theory that the negligence of the engineer was an assumed risk of the employment, and as such barred a recovery. The appeal was heard by but five of the seven justices, one of whom dissented.

QUESTION INVOLVED.

To what extent can the decedent be held to have assumed the risk of a negligent act of a fellow servant which caused his death, where there was neither notice nor reason for him to have anticipated such act?

Briefly, is the negligence of a fellow servant under such circumstances a risk assumed incidental to such employment?

The decision of the Supreme Court of Pennsylvania eliminates all other questions and restricts the issue to this narrow proposition at the same time finding and basing its decision on the theory that the decedent was engaged in interstate commerce; that the negligence was the negligence of the engineer and that the decedent was not negligent (Record, pages 84-85).

These questions had already been resolved in favor of the plaintiff by the jury and Common Pleas Court; they were purely issues of fact. The Supreme Court in so finding used this language (Record, page 84):—

> "Plaintiff, as administratrix of her deceased husband's estate, brought an action of trespass, averring he was negligently killed while working for defendant in interstate commerce. A verdict and judgment having been entered for plaintiff, defendant appeals, *inter alia*, because its point for binding instructions was refused and its motion for judgment *non obstante veredicto* dismissed. Complaint is made that these decisions are erroneous for several reasons, but we will consider only one thereof, viz: did decedent's death result from a risk which he assumed as the result of his employment? If it did plaintiff cannot recover.
>
> "Taking the evidence in the light most favorable to plaintiff, as of course we must do, we find the facts to be as follows: Decedent was a member of a crew which had brought a train from Philadelphia to South Bethlehem. Some of the cars contained goods shipped in interstate commerce." * * *
>
> "In considering the present question we also assume the negligence was that of the engineer and not of decedent" (Record, page 85).

There was not a word of evidence to indicate negligence on the part of the decedent in fact no defense was offered, but on the contrary, the negligence was inexcusable and exclusively that of the engineer.

The error of the learned Court below from which we are appealing is so clear and obvious that it is perhaps superflous to refer to any other decision than that of your Honorable Court in **Chicago, Rock Island and Pacific Railroad vs. Ward,** 40 Supreme Court Reporter, 276. That decision of itself justifies a reversal of the judgment of the Court below and, of course, the allowance of this *certiorari*.

BRIEF DISCUSSION OF THE EVIDENCE.

The decedent was engaged as a member of a crew hauling interstate commerce between Philadelphia, Pennsylvania, and South Bethlehem, Pennsylvania. The defendant admitted that the train contained interstate commerce (Record, page 27), and the Supreme Court of Pennsylvania held in its opinion that the decedent was engaged in Interstate Commerce at the time of his injury (Record, page 84), and its decision is based on that theory. That question is, therefore, eliminated from the case, and the fact that the accident occurred in a yard has no bearing whatever on the issue nor does the fact that the derail was involved, since the derail was harmless in itself and the proximate cause of the injury as admitted by the Court below was not the derail, but the failure of the engineer to respect the warnings and signals, to wit, his negligence.

The decedent's "run" was incomplete. In fact the "run" was incomplete until the caboose had been put away and the engine placed in the roundhouse (Record, page 39). In other words, the decedent's employment, as well as other members of the crew of this particular train, had been continuous from the time they left Philadelphia, and was incomplete at the time of the accident; it was a fixed run, and in no sense a shifting operation (Record, page 39).

There can be no question as to the negligence of the engineer. In the record it is undenied. It appears that the engine started to push the caboose, several hundred feet from the point of the accident, for the purpose of reaching the caboose storage track. It was necessary for one of the crew to occupy the position assumed by the decedent (Record, page 41), and the Court below found that the decedent was acting in the course of his employment (Record, page 85).

Previous to the movement the conductor warned the engineer, of the presence of the derail (Record, page 40), and in addition to this as the caboose approached the derail the decedent not only gave a signal to stop, but he yelled "Whoa, whoa" (Record, page 30). The conductor

who was riding on the tender also called to the engineer to stop (Record, page 45), when the engine was two car lengths from the derail, thus giving him about six times the space necessary to make a stop, since it was testified that the engine was only traveling at the rate of five miles per hour, and that it could be stopped under those conditions within 10 feet (Record, page 59). He also made clear that decedent's signal was a stop signal (Record, page 41).

Admittedly it was impossible for the decedent to have jumped from the caboose on account of the presence of cars on the adjoining track (Record, page 43), and it was the collision with those cars that caused his death.

The derail was located approximately 36 feet from the main track (Record, page 44), and at the time a passenger train was standing on the main track. Consequently, had the caboose not been derailed it would have struck the passenger train (Record, page 62).

As a matter of fact, although it was testified that the engine could have been stopped within 10 feet, it traveled several times that distance over the derail and until the caboose, engine and part of tender were off the track before brought to a stop (Record, page 53). Showing conclusively that the engineer failed to exercise caution and obey the signals of decedent and conductor to stop.

The only feeble effort made at a defense was the vague suggestion that the decedent might have crossed the platform from the right side of caboose where his duties required him to be, to the left side and jumped. This, of course, involved a question of fact which was fully argued to the jury.

ARGUMENT ON THE LAW.

It was of course idle to contend that the decedent might have crossed to the other side of the platform and jumped for two reasons:—

First.—He was justified in assuming the engineer would use due care and stop before striking the derail.

Secondly.—He knew the engineer had been warned of the derail (Record, page 40), and he was therefore justified in assuming that he would heed the notice and signal, and there was nothing to warn him to the contrary until the collision, and it is apparent that until that moment (collision) the decedent assumed the caboose would stop.

As a general principle of law one is justified in assuming that another will exercise due care. Chesapeake and Ohio Railway Company *vs.* DeAtley, 241 U. S. 310; 36 Supreme Court Reporter, 564-565; Shields *vs.* P. R. T. Co., 261 Pa. 622.

Since, however, the jury and the Supreme Court have both found that the negligence was the negligence of the engineer, it is unnecessary to pursue this argument any further.

In passing, however, we would note that the jury by its verdict and both of the Courts below found that the decedent was engaged in interstate commerce, and it was decided on that theory. They also found that the negligence responsible for his death was the negligence of the engineer, and therefore, the fact that the accident took place in a yard is unimportant, and has no bearing whatever on this issue, since the negligence was the negligence of the engineer, resulting in the death of the decedent while both were engaged in interstate commerce. This also answers the Court's reference to various cases where accidents occurred in railroad yards. Those cases would be applicable if the negligence in this instance was negligent construction or negligence due exclusively to the fact that the accident took place in the yard. As a matter of fact, the derail was a mere incident. The proximate cause of the decedent's death was negligence of the engineer. Hence, whether it was due to collision with another train resulting from a "derail" or other cause is immaterial, and the fallacy of this contention of the Court below is obvious.

We shall briefly refer to the several cases cited by the

Court upon which it based its conclusion that the negligence in this case was an assumed risk of the employment. On both facts and principles they are distinguishable from the case at bar which is ruled by the cases discussed thereafter. There was absolutely not a word of evidence that would justify the conclusion that there had been an assumption of risk in this case. The cases so relied upon by the Court below were:—

Jacobs vs. Southern Railway Company, 36 Supreme Court Reporter 588; 241 U. S. 229, in which the plaintiff was held to have assumed the risk incident to a pile of cinders which had been customarily placed in the same position for many years, it was clearly within his vision and known when he undertook to board an engine holding a vessel of water in his hands. The objection was to the charge on a second trial, which resulted in a verdict for the defendant. The case recognizes the general principles of law for which we contend, however such facts can have no bearing upon the decision of our case.

Reese vs. Philadelphia & Reading Railway Company, 36 Supreme Court Reporter 134; 239 U. S. 463, simply decides that there was no evidence of negligence and that a railroad yard necessarily has a great number of tracks, and switches close to one another, citing as an authority **Randall vs. B. & O. R. R Co.** 109 U. S. 478, neither of which cases can have any bearing on this issue.

Tuttle vs. Detroit Grand Haven and Milwaukee Railway Company, 122 U. S. 189, has no bearing whatever on the present issue, having been decided before the Federal Act and simply involved the question of negligence in the permanent construction of tracks.

Boldt vs. Pennsylvania Railroad, 245 U. S. 441 (38 Supreme Court Reporter 139), has no bearing on this case, being an appeal from a judgment on a verdict for the defendant. At the same time the rule is quoted that "at common-law a servant assumes extraordinary risks incident to his employment or risks caused *by the master's negligence which are obvious or fully known and appre-*

ciated by him." In our case it was unknown and unanticipated.

It is clear that the learned Court below misconceived the effect of the aforementioned decisions, and in no sense can they control the present issue since they are either cases where there were jury verdicts for defendants or where there were open, obvious and known dangers and neither class of cases can control ours.

Another case cited by the Court on this point, **Seaboard Airline Railway Company vs. Horten,** 233 U. S. 492; 34 Supreme Court Reporter 635, can on its facts have no bearing on this case favorable to the defendant, but the decision makes clear and sustains our position that notice and appreciation of risk are essential before they can bar a recovery.

The other cases cited by the Court below in reality recognize the law applicable to this case, to wit, that an employee does not assume risks incident to unusual or extraordinary dangers. Hence, both under the theory that one may assume another will exercise due care as well as the decisions of your Court hereinafter referred to, the negligence of the engineer, since it was not to have been anticipated, belongs within the class of extraordinary risks which are not assumed, as admitted by the opinion of the Court below.

In passing we want to make clear that since the jury found as a fact and the Court below holds that the decedent was engaged in interstate commerce the fact that the accident occurred in the yard is immaterial, since the case does not belong to that class of cases where there was a known danger, the risk of which had been assumed. Even under the decision of the Court below this was not contended. There was no notice nor reason to have anticipated the negligence of the engineer. Therefore the cases of yard operation referred to by the Court below under its opinion did not affect the interstate character of decedent's employment. That he was employed in interstate commerce, although so admitted, is unquestionable and is thoroughly established by numerous decisions of your Honorable Court, including:—

St. Louis, San Francisco & Texas Rwy. Co. vs. Seale et al., 33 Supreme Court Reporter 651; 229 U. S. 156;

North Carolina Railroad Co. vs. Zachary, 34 Supreme Court Reporter 305-306; 232 U. S. 248;

Erie Railroad Company vs. Winfield, 37 Supreme Court Reporter 556; 244 U. S. 170;

Chicago, Rock Island & Pacific Railroad vs. Ward, 40 Supreme Court Reporter 276;

Philadelphia & Reading Railway Co. vs. Hancock, 40 Supreme Court Reporter 512.

The fact that the train ran entirely within the State does not, under the circumstances, deprive the decedent of the benefits of the Federal Act. **New York Central Railroad vs. Carr,** 35 Supreme Court Reporter 80, 238 U. S. 260, and **Philadelphia & Reading Railway Co. vs. Hancock,** 40 Supreme Court Reporter 512.

Whether a railroad employee is engaged in interstate commerce depends upon whether the work being done is so closly related to interstate commerce as to be practically a part of it.

Erie Railroad vs. Collins, 40 Supreme Court Reporter 450;

Erie Railroad vs. Szary, 40 Supreme Court Reporter 454.

The decedent had one fixed duty, which constituted a day's work and the run was incomplete at the time of the accident (Record, page 39). This was in no sense a "shifting operation," but, we repeat, it was part of a continuous incompleted run. The Court below for the purposes of its decision very properly admits that the decedent was engaged in interstate commerce, and narrowed the issue to the one question (Record, page 84):—

> "Did decedent's death result from a risk which he assumed as the result of his employment? If it did, plaintiff cannot recover."

The Court then concluded that the negligence resulting in decedent's death was the negligence of the engineer, and although there was no notice or reason for him to have anticipated such negligence, that it was nevertheless an assumed risk of the employment. This whole question is thus brought within that narrow issue, which is obviously wrong.

Assumption of Risk.

Your Honorable Court in several recent cases has clearly defined the doctrine of assumption of risk, its application and the relative duties of Court and jury with respect thereto, and we shall briefly refer to those authorities which control this case and were ignored in the opinion of the Court below.

In **Kanawha and Michigan Rwy. Co. vs. Kerse,** 36 Supreme Court Reporter 174, 239 U. S. 576, your Honorable Court in an oopinion by Mr. Justice Pitney sustained a verdict for the plaintiff where the facts were much more favorable to the defendant than in the case at bar. Commencing at page 175, the following language was used in your opinion:—

> "The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial Court could not be charged with error in refusing to take the question from the jury.
>
> "Only one matter remains to be mentioned. The Court refused to instruct the jury, as requested by defendant, 'that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on top of a box car, and with such knowledge continued in the service of the Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P.

Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein.'

"Since knowledge of a fixed obstruction over the track in such a position as not to clear a man standing upon the top of a box car would seem necessarily to import to an experienced brakeman that there was a risk of injury to him in that situation, and since there was no evidence of objection by Barry or promise of reparation by his employer to rebut the presumption that the risk was assumed, the refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based. In response to particular interrogatories submitted by the Court, they found that Barry did not know that the piece of timber was stretched over the track, and (of course) did not know that the timber was so low that it would not clear him standing upon the top of the box car.

"A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction as to the legal result that would follow only upon the hypothesis that the deceased knew of the presence of the timber, and knew it would not clear a man standing upon the top of a box car, became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merits. Greenleaf *vs.* Birth, 5 Pet. 132, 135, S. L. ed. 72, 73; Fidelity & D. Co. *vs.* Courtney, 186 U. S. 342, 251, 46 L. ed. 1193, 1198, 22 Sup. Ct. Rep. 833.

"Judgment affirmed."

In **Chesapeake & Ohio Railway Company vs. De Atley,** 36 Supreme Court Reporter, 564, the head brake-

man of a freight train, though assuming the risk normally incident to the boarding of a moving train in the discharge of his duties, your Honorable Court held, does not assume the risk of injury involved in an attempt to board a train operated at an unusually high and dangerous rate of speed until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinary careful person in his situation would have observed the one and appreciated the other.

It is for the jury to say whether the head brakeman on a freight train assumed the risk of injury in an attempt in the discharge of his duties to board the engine of his train, which was moving directly toward him at a speed of twelve miles per hour.

There is no error in refusing to give a requested instruction upon the question of the assumption of risk which deals solely with the ordinary risks and hazards, and embodies no definition of such risks and hazards, nor any qualifications appropriate to the particular facts of the case, which involves a question of extraordinary hazard.

> "We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. The Court of Appeals reasoned that plaintiff's duties required him to be upon the passing